

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

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**JUN 14 1996**

*Federal Communications Commission  
Office of Secretary*

In the Matter of )  
)  
Examination of Current Policy )  
Concerning the Treatment of )  
Confidential Information )  
Submitted to the Commission )

GC Docket No. 96-55

**DOCKET FILE COPY ORIGINAL**

**COMMENTS OF GTE**

GTE Service Corporation ("GTE"), on behalf of its affiliated domestic telephone operating and wireless companies, respectfully submits its comments in response to the above-captioned Notice of Inquiry and Notice of Proposed Rulemaking ("NOI").<sup>1</sup>

**I. INTRODUCTION**

GTE shares the Commission's apparent concern that heightened competition in the telecommunications industry, coupled with the need for the broadest possible dissemination of information generated in Commission proceedings, may require some refinement of the process by which the competing interests of companies holding competitively sensitive information and those parties desiring disclosure of that information are balanced. At this time, however, GTE does not believe that significant changes to the Commission's existing rule or procedures are necessary. Moreover, GTE does not believe that

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<sup>1</sup> FCC 96-109 (released March 25, 1996).

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it would be administratively efficient to change radically the “rules of the game” at a time when their purpose has taken on such added significance.

## **II. GTE SUPPORTS LIMITED MODIFICATIONS TO EXISTING RULES**

More so than at any time in the past, GTE is concerned about the potential for Commission proceedings to be used by parties as vehicles for obtaining sensitive information regarding existing and potential competitors. There can be no dispute that the more information a company has regarding its competitors, the more effectively that company can compete. For purposes of FCC proceedings, this heightened concern cuts two ways. First, companies submitting information to the Commission may feel the need to examine that information more carefully to avoid inadvertent disclosures of competitively sensitive information and to ensure that necessary protections against disclosure are obtained when necessary. Second, competing companies desiring such information for reasons unrelated to the public interest will likely push hard for its disclosure. As a result, the number of requests motivated solely by the desire to obtain competitively sensitive information may increase significantly.

In this context, the parties at the greatest disadvantage are the ones most regulated – including local exchange carriers (“LECs”) such as the GTE telephone operating companies – because they are the ones *required* to submit certain types of competitively sensitive information. New and alternative service providers are not required to disclose publicly the same volume or type of information as their regulated competitors, such as information regarding customers, service offerings, pricing development, and extensive cost and

financial data. The continued submission of such information, without effective rules and procedures in place to protect it from disclosure that is not in the public interest, will place regulated companies at a distinct competitive disadvantage, a result clearly at odds with the intent of the Telecommunications Act of 1996 ("1996 Act"). For this reason, GTE supports limited changes to the Commission's existing rules and procedures

**a. Guidelines for the Submissions of Requests for Confidential Treatment (§§ 56-59).**

GTE endorses the Commission's suggestion (at ¶ 56) regarding the adoption of guidelines for the submission of requests for confidentiality. More specific guidelines as to what information the Commission needs to evaluate a request for confidentiality will serve at least three important purposes. First, it will provide needed direction to parties with little or no experience with such requests. In this way, an otherwise meritorious request will not be denied simply because the requesting party was not clear of the showing required. Second, the guidelines will force parties filing such requests to analyze more closely the need for - and indeed their chances of receiving - confidential treatment. Finally, the Commission should be able to evaluate such requests more quickly and efficiently if all of the information it needs is provided with the initial request.

GTE believes that the six items of information included in the NOI (at ¶ 57) are appropriate. With respect to item 6, however, GTE believes that the requesting party should be required to explain how disclosure could result in significant harmful effects to its competitive position rather than "specific

information concerning why disclosure would result in substantial harmful effects.” A given piece of information may be of value to more than one competitor for more than one reason. For example, information regarding a new product or service may be of great value to competitors -- some of which may be unknown to the applicant -- for any number of reasons. Consequently, the magnitude of the potential impact on that applicant's competitive position may be virtually impossible to quantify with any reasonable degree of precision.

For this reason, GTE is concerned that, as currently worded, item 6 would create a burden that may prove unduly difficult, if not impossible, to meet. Accordingly, GTE believes that requiring an explanation as to how disclosure could result in significant harmful effects, based upon the knowledge and information reasonably available to the applicant, would better balance the need for the required showing with the practical limitations on the ability of the applicant to provide specific information regarding potential harmful effects.

**b. Disclosure of Records Receiving Confidential Treatment (§§ 21-24).**

Parties seeking disclosure of protected information should continue to be required to make a “persuasive showing” that the public interest in disclosure clearly outweighs the potential harm to the competitive position of the party submitting that information. The standard enunciated by the Commission, that “specific and concrete public benefits be reasonably anticipated before properly

exempt information will be released on a discretionary basis,”<sup>2</sup> provides a sound basis for making this evaluation. This standard should apply to requests for disclosure of *any* information receiving confidential treatment by the Commission, whether such treatment was obtained under Section 0.457 (“Exemption 4”) or under Section 0.459 of the Commission’s rules.

**c. The Model Protective Order (§§ 36-37).**

GTE supports the Commission’s proposal to formulate a standardized protective order. GTE also agrees with the Commission that protective orders should not be used as a matter of course every time confidential information is disclosed. The appropriateness of a protective order should be determined on a case-by-case basis. In general, competitively sensitive information that, in its unaltered form, is not central to a Commission order should be a candidate for a protective order. In other words, if the information can be aggregated or summarized for purposes of a Commission order, the raw information should be protected from widespread disclosure. If, on the other hand, the information is central to a Commission decision but loses its significance for purposes of that decision if it is aggregated or summarized, a protective order may not be appropriate.<sup>3</sup>

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<sup>2</sup> NOI at ¶ 24.

<sup>3</sup> Included as Attachment A to these comments is a marked-up version of the Commission’s model protective order, reflecting GTE’s suggested revisions. Parties should be free, however, to modify the provisions of the model order whenever unique or unusual situations require.

**d. Requests for Confidentiality In the Tariff Review Process (§§ 42-45).**

The Commission's price cap rules require LECs to submit various types of cost and demand data in support of tariffs proposing rates for new services as well as rate level and rate structure changes. Demand data necessary to calculate changes to price cap indices are provided on a "tariff entity" basis. LECs typically provide summary cost data in support of proposed prices for new services offered on a general basis within their serving areas. Such aggregated data should continue to be made available as part of the public record.

However, LECs should be allowed to restrict from public disclosure unit data detailing exchange or customer-specific information and cost support data specifying cost modeling assumptions. In addition, as local exchange competition grows, the Commission should correspondingly relax its pricing and tariff filing regulations in order to permit LECs to be more responsive to competitive pressures.<sup>4</sup> Indeed, GTE has urged the Commission to adopt many of the baseline pricing flexibility proposals set forth in its Docket 94-1 proceeding, including reduced cost support requirements, shortened tariff filing notice periods, and the use of contract pricing.

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<sup>4</sup> With competition, LECs will seek to design service offerings narrowly tailored to individual customers or sets of customers in smaller geographic markets. Public disclosures of such customer-specific service arrangements would defeat the very purpose of relaxing the pricing and tariff filing requirements, *i.e.*, to permit LECs to respond more effectively to competition.

As the Commission has observed, many of its own rules severely restrict a LEC's ability to introduce new services that customers desire in a timely manner.<sup>5</sup> Thus, additional delays should not be introduced into the tariff process by requiring the submission of confidential information in advance of the tariff filing itself, as suggested in the NOI (at ¶ 44). Instead, the Commission should continue to allow LECs to submit summary cost and demand information with their initial tariff submissions and to file the underlying disaggregated data as confidential information. In the event that an outside party makes a "persuasive showing" that such data should be disclosed, such disclosure should only be allowed pursuant to a protective order.<sup>6</sup>

**e. Proposed Clarifications to Commission Rules (¶¶ 60-61).**

The Commission proposes to clarify its rules in two ways. First, Section 0.459 of the Commission's rules would be amended to make express the Commission's existing practice of deferring a ruling on a request for confidentiality if no request for inspection has been made. Second, the Commission proposes to amend the title of Section 0.457(d) of its rules to better describe its contents. The new title would read: "Certain trade secrets and

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<sup>5</sup> See *Price Cap Performance Review for Local Exchange Carriers, etc.*, 11 FCC Rcd 858 (1995).

<sup>6</sup> With open access to summary cost and demand information, it would appear that the only justification for disclosing the disaggregated version would be a "persuasive showing" that the such information has not been accurately summarized. Even if such a showing were made in a given case, limited access pursuant to a protective order would be sufficient to make the final determination.

commercial or financial information obtained from any person and privileged or confidential – categories of materials not routinely available for public inspection.”<sup>7</sup>

GTE supports the proposed clarification to Section 0.459 as GTE believes that it would reassure parties requesting confidentiality by making it clear that they will not necessarily receive a response to their request until the Commission has received a request for their information. In addition, the proposal should significantly reduce the burdens on the Commission to process confidentiality requests. With respect to the title amendment to Section 0.457(d), GTE is concerned that the use of the qualifying term “certain” suggests that there may be, for example, trade secrets that are confidential but, for some reason, do not fall under the provisions of this section. Since such information would always fall under this section, GTE suggests that the word “certain” be dropped.

### **III. CONCLUSION**

With the importance of protecting competitively sensitive information on the rise, GTE believes that significant modifications at this time to the Commission’s rules and procedures regarding the treatment of confidential information would be ill-advised. However, because the limited modifications discussed above will improve existing procedures without dramatically changing them, GTE supports them.

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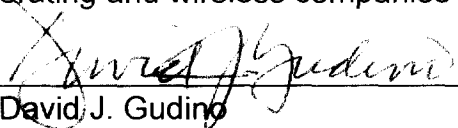
<sup>7</sup> NOI at ¶ 61.



Respectfully submitted,

GTE Service Corporation, on behalf of  
its affiliated domestic telephone  
operating and wireless companies

By

  
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June 14, 1996

Its Attorney

In the Matter of

[Name of Proceeding]

) Docket No. \_\_\_\_

### **PROTECTIVE ORDER**

This Protective Order is a device to facilitate and expedite the review of documents containing trade secrets and commercial or financial information obtained from a person and privileged or confidential. It reflects the manner in which "Confidential Information," as that term is defined herein, is to be treated. The Order is not intended to constitute a resolution of the merits concerning whether any Confidential Information would be released publicly by the Commission upon a proper request under the Freedom of Information Act or otherwise other applicable law or regulation.

1. For purposes of this Order, "Confidential Information" shall in the first instance mean either (i) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith constitutes trade secrets and commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) or (ii) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith falls within the terms of [cite Commission order designating items for treatment as Confidential Information]. Confidential Information ~~shall be deemed to include~~ additional copies of and information derived from Confidential Information.

2. The Commission may sua sponte or upon petition determine that all or part of the information claimed as "Confidential Information" is not entitled to such treatment.

3. Confidential Information submitted to the Commission shall bear on the front page in bold print. "CONTAINS PRIVILEGED AND CONFIDENTIAL INFORMATION - DO NOT RELEASE." Confidential Information shall be segregated by the Submitting Party from all non-confidential information submitted to the Commission. To the extent a document contains both Confidential Information and non-confidential information, the submitting party shall designate the specific portions of the document claimed to contain Confidential Information and shall, where feasible, also submit a redacted version not containing Confidential Information.

4. The Secretary of the Commission or other Commission staff to whom Confidential Information is submitted shall place the Confidential

Information in a non-public file. In the event that any person requests that Confidential Information be released publicly, the Commission will treat the request pursuant to 47 C.F.R. § 0.461

5. Confidential Information shall only be made available to Commission staff, Commission consultants and to counsel to the Reviewing Parties or if a Reviewing Party has no counsel to a person designated by the Reviewing Party. Reviewing Party shall mean a party to a Commission proceeding or any person or entity filing a pleading in a Commission proceeding. Before counsel to a Reviewing Party or such other designated person may obtain access to Confidential Information, counsel or such other designated person must execute the attached Declaration.

6. Counsel to a Reviewing Party or such other person designated pursuant to Paragraph 5 may disclose Confidential Information to other Authorized Representatives to whom disclosure is permitted under the terms of paragraph 7 of this Protective Order only after advising such Authorized Representatives of the terms and obligations of the Order. In addition, before Authorized Representatives may obtain access to Confidential Information, Authorized Representatives must execute the attached Declaration.

7. Authorized Representatives shall be limited to:

- a. Counsel for the Reviewing Parties to this proceeding including in-house counsel actively engaged in the conduct of this proceeding and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services in this proceeding, provided that such persons are not representing or advising or otherwise assisting ...;
- b. Specified persons, including employees of the Reviewing Parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in this proceeding except that disclosure to persons in a position to use this information for competitive commercial or business purposes shall require the approval of the Commission; or
- c. Any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper.

8. Confidential Information shall be maintained by a Submitting Party for inspection at ~~least the~~ two locations, at least one of which shall be in Washington, D.C. Inspection shall be carried out by Authorized Representatives by appointment during normal business hours. The Submitting Party shall

provide copies of the Confidential Material to Authorized Representatives upon request and may charge a reasonable copying fee not to exceed twenty five cents per page.

9. Authorized Representatives may take additional copies of Confidential Information but only to the extent required and solely for the preparation and use in this proceeding, and provided further that the original copy and all other copies of the Confidential Information shall remain in the care and control of Authorized Representatives at all times and shall not pass to any other persons except as provided herein.

10. Counsel for Reviewing Parties shall provide to the Submitting Party and the Commission ~~with~~ a copy of the attached Declaration for each Authorized Representative within five (5) business days after the attached Declaration is executed, or by any other deadline that may be prescribed by the Commission.

11. Confidential Information shall not be used by any person granted access under this Protective Order for any purpose other than for use in this proceeding (including any subsequent administrative or judicial review), shall not be used for competitive business purposes, and shall not be disclosed except in accordance with this Order. This shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to the Confidential Information nor otherwise learned of its contents.

12. Reviewing Parties may, in any pleadings that they file in this proceeding, reference the Confidential Information, but only if they comply with the following procedures:

- a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings;
- b. The portions containing or disclosing Confidential Information must be covered by a separate letter referencing this Protective Order.
- c. Each page of any Party's filing that contains or discloses Confidential Information subject to this Order must be clearly marked: "Confidential Information included pursuant to Protective Order. [cite proceeding]." and
- d. The confidential portion(s) of the pleading shall be served upon the Secretary of the Commission, the Submitting Party, and those Reviewing Parties that have signed the attached Declaration. Such confidential portions shall be served under seal, and shall not be

placed in the Commission's Public File unless the Commission directs otherwise (with notice to the Submitting Party and an opportunity to comments on such proposed disclosure). A Reviewing Party filing a pleading containing Confidential Information shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's public files. Reviewing Parties may provide courtesy copies of pleadings containing Confidential Information to Commission staff so long as the notation required by subsection c. of this paragraph is not removed.

13. Should a Reviewing Party that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, it shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure of Confidential Information, the violating party shall immediately notify the Commission and the Submitting Party in writing of the identity of each party known or reasonably suspected to have obtained the Confidential Information through such disclosure and take all necessary steps to remedy the improper disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to denial of further access to Confidential Information in this proceeding. Nothing in this Protective Order shall limit the rights and remedies available to the Submitting Party against any party using Confidential Information in a manner not authorized by this Protective Order.

14. Within two weeks after final resolution of this proceeding (which includes any administrative or judicial appeals), Authorized Representatives of Reviewing Parties shall destroy all Confidential Information as well as all copies and derivative materials made, and shall certify in a writing served on the Commission and the Submitting Party that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel to a Reviewing Party may retain two copies of pleadings submitted on behalf of the Reviewing Party. Any Confidential Information contained in any copies of pleadings retained by counsel to a Reviewing Party shall be protected from disclosure in accordance with paragraphs 9 and 11 of this Protective Order.

15. Disclosure of Confidential Information as provided herein shall not be deemed a waiver by the Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing Parties, by reviewing these materials: (a) agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceeding; and (c) agree that accidental disclosure of privileged information shall not be deemed a waiver of this privilege.

16. The entry of this Protective Order is without prejudice to the rights of the Submitting Party to apply for additional or different protection ~~where it is deemed necessary~~ or to the rights of Reviewing Parties to request further or renewed disclosure of Confidential Information. Moreover, it in no way precludes the Commission from disclosing any Confidential Information where it determines the public interest so requires.

17. The Protective Order is issued pursuant to Section 4(i) of the Communications Act as amended, 47 U.S.C. § 154(i) and 47 C.F.R. § 0.457(d).

18. As used in this Order, the term "Commission" shall also include any arms of the Commission acting pursuant to delegated authority.

DECLARATION  
[Cite Proceeding]

I, \_\_\_\_\_, hereby declare under penalty of perjury under the laws of the United States of America that I have read the foregoing Protective Order ~~that has been~~ entered by the Commission in this proceeding, and that I agree ~~that I will to~~ be bound by its terms pertaining to the treatment of Confidential Information submitted by parties to this proceeding. I understand that the Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Protective Order and shall be used only for purposes of ~~the this proceeding, in this matter~~. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission.

(signed) \_\_\_\_\_  
printed name) \_\_\_\_\_  
(title) \_\_\_\_\_  
(affiliation) \_\_\_\_\_  
(address) \_\_\_\_\_  
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